

REMARKS

Claims 1-37, 87-90 and 161-171 are pending in the patent application. Claims 1, 22 and 161 have been amended. No new matter has been entered. Reconsideration of the pending claims is respectfully requested.

Claim Objections

Claims 1, 22 and 161 were objected to as including the language of “the acts of”. The Applicants respectfully disagree and believe that the phrase “the acts of” is proper because it further clarifies that the method claims are not step-plus-function claims. To expedite prosecution, however, the Applicants have amended claims 1, 22 and 161 to eliminate the phrase “the acts of”. Thus, the claim objections on claims 1, 22 and 161 should be withdrawn.

Provisional Obviousness-Type Double Patenting Rejection

Claims 1-37, 87-90 and 162-171 were provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over pending claims 1-35, 81-109 and 148-155 of Application No. 10/190,375. Claims 1, 2, 4-9, 11-13, 16-23, 25-32, 35-37, 88, 90, 161-167 and 171 were provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over pending claims 38-40, 42, 44-56, 76-78, 80-86, 119, 120, 124-140, 143-159 and 162-168 of Application No. 09/965,426. Claims 1, 2, 9-12, 16, 21-23, 29-31, 36, 37, 161, 162, 165 and 166 were provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over pending claims 70-75 and 87-100 of Application No. 10/424,460. To obviate the obviousness-type double patenting rejection, the Applicants are filing a terminal disclaimer herewith. Thus, the provisional obviousness-type double patenting rejections should be withdrawn.

35 U.S.C. § 103 Rejections

Claims 1-6, 8-11, 13-26, 28-30, 32-37, 87-90, 161, 162 and 164-171 were rejected as being obvious over U.S. Patent 6,054,153 to Carr (“Carr”) in view of U.S. Patent No. 4,522,835 to Woodruff (“Woodruff”), U.S. Patent No. 3,459,117 to Koch (“Koch”) and U.S. Patent No. 6,042,859 to Shaklai (“Shaklai”). Claims 1, 2, 5-10, 12-15, 18-23, 25-29, 31-34, 36, 37, 87-90

and 161-171 were rejected as being obvious over U.S. Patent No. 5,711,978 to Breen (“Breen”) in view of Woodruff, Koch, Shaklai and DE 1935566 A to Verbruggen (“Verbruggen”).

One of the arguments raised with respect to commercial success was that “it is not clear if the claimed invention resulted in the commercial success or whether other factors contributed to the success, such as increase[d] advertising/marketing.” Page 10 of the Office Action. To assist in showing that the commercial success was not related to increased advertising/marketing, the Applicants are submitting herewith evidence in the form of a 37 C.F.R. §1.132 declaration by one of the co-inventors Mr. Gary R. DelDuca (“the DelDuca Sixth Declaration”) (Exhibit 1) to further assist in discussing the commercial success. The Applicants note that Mr. DelDuca previously submitted five declarations to assist in explaining the invention, showing the non-obviousness of the invention, explaining the phrase “turns brown in a natural time period” and explaining the applied references.

Pactiv and its predecessor Tenneco Packaging Inc. (herein “Pactiv”) have sold modified atmosphere packaging systems beginning in 1998 (the traditional ActiveTech® meat packaging system). DelDuca Decl. ¶ 4. The Pactiv traditional ActiveTech® meat packaging system includes meats being placed in polystyrene trays and covered with oxygen-permeable, polyvinyl chloride (“PVC”) overwraps. *Id.* The wrapped trays of meat are then placed in an outer barrier bag. Ambient air is removed and replaced with a blend of 30 vol.% carbon dioxide, and the balance being nitrogen. *Id.*

Beginning in March of 2002, Pactiv began offering for sale an improved ActiveTech® meat packaging system. DelDuca Decl. ¶ 5. Pactiv’s improved ActiveTech® meat packaging system includes meats being placed in polystyrene trays and covered with oxygen-permeable, PVC overwraps. *Id.* The wrapped trays of meat are then placed in an outer barrier bag. *Id.* Ambient air is removed and replaced with a blend of 0.4 vol.% carbon monoxide (CO), 30 vol.% carbon dioxide, and the balance being nitrogen. *Id.*

The modified atmosphere used in Pactiv’s improved ActiveTech® meat packaging system differs from the modified atmosphere used in the Pactiv’s traditional ActiveTech® meat packaging system. DelDuca Decl. ¶ 6. Specifically, Pactiv’s improved ActiveTech® meat packaging system uses 0.4 vol.% CO, while Pactiv’s traditional ActiveTech® meat packaging system does not use CO. *Id.* Because of the addition of CO, the equipment used in Pactiv’s improved ActiveTech® meat packaging system may vary slightly as compared to Pactiv’s

traditional ActiveTech® meat packaging system. *Id.* Specifically, a mixer may be added to Pactiv's improved ActiveTech® meat packaging system to mix the CO, carbon dioxide, and nitrogen. *Id.* Additionally, a CO gas recovery hood and safety features may also be included in Pactiv's improved ActiveTech® meat packaging system.

The purchasers of either Pactiv's improved ActiveTech® meat packaging system or Pactiv's traditional ActiveTech® meat packaging system receive a license for the process and the knowledge to run such a process. DelDuca Decl. ¶ 7. Pactiv allows its customers to use its oxygen-absorber dispensing-machine at no cost. *Id.* The remaining machinery used to perform either Pactiv's improved ActiveTech® meat packaging system or Pactiv's traditional ActiveTech® meat packaging system is purchased by the customer. *Id.* Typically, this remaining machinery is sold by Pactiv to its customers. *Id.* The customers also typically purchase the oxygen absorbers, trays, and film from Pactiv. *Id.*

Sales of Pactiv's traditional ActiveTech® meat packaging system were decreasing in 2000 and 2001. DelDuca Decl. ¶ 8. The sales of Pactiv's improved ActiveTech® meat packaging system, however, have substantially increased since its introduction in March of 2002. *Id.* The sales of Pactiv's improved ActiveTech® meat packaging system have been commercially successful with sales numbers of about or over 6 million in each of the years since 2003. *Id.* These sales include the total of the purchased licenses, the purchased remaining machinery, and supplies (which include oxygen absorbers, activator fluid, and film). *Id.*

Since March of 2002, both Pactiv's improved ActiveTech® meat packaging system and Pactiv's traditional ActiveTech® meat packaging system have been available for sale. DelDuca Decl. ¶ 9. Since March 2002, no customer has purchased Pactiv's traditional ActiveTech® meat packaging system. *Id.* In fact, every customer still practicing Pactiv's technology has converted its traditional ActiveTech® meat packaging system into Pactiv's improved ActiveTech® meat packaging system. *Id.* Thus, to my knowledge no customer is still practicing Pactiv's traditional ActiveTech® meat packaging system. *Id.* It can be concluded that these customers prefer the Pactiv's improved ActiveTech® meat packaging system over Pactiv's traditional ActiveTech® meat packaging system. *Id.* The cost of Pactiv's improved ActiveTech® meat packaging system versus Pactiv's traditional ActiveTech® meat packaging system is fractionally more expensive. *Id.* Thus, the commercial success of Pactiv's improved ActiveTech® meat packaging system cannot be attributed to a cost advantage. *Id.*

Since 2002, there has been no increase in the number of sales personnel from Pactiv who are responsible for sales of Pactiv's improved ActiveTech® meat packaging system. DelDuca Decl. ¶ 10. In fact, the number of sales personnel who are responsible for sales of the Pactiv's improved ActiveTech® meat packaging system have decreased since 2002. *Id.* There has been little or no advertising directed to sales of Pactiv's improved ActiveTech® meat packaging system since 2002. *Id.* The amount of advertising, if any, has not increased since 2002 and likely has decreased substantially from that directed to Pactiv's traditional ActiveTech® meat packaging system. *Id.* Thus, the commercial success of Pactiv's improved ActiveTech® meat packaging system cannot be attributed to increased marketing/advertising. *Id.*

The process of manufacturing using Pactiv's improved ActiveTech® meat packaging system is an example of a process that would be covered under independent claims 1, 22 and 161 of the present application. DelDuca Decl. ¶ 11.

The Applicants further reiterate its arguments with respect to the non-obviousness of the pending claims that were raised in previous responses to Office Actions on September 8, 2003; June 16, 2004; May 10, 2005; November 2, 2005 and May 25, 2006.

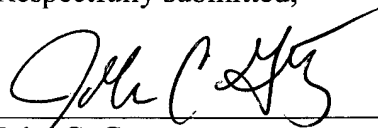
Thus, claims 1-6, 8-11, 13-26, 28-30, 32-37, 87-90, 161, 162 and 164-171 are not obvious over Carr, Woodruff, Koch, Shaklai or any combination thereof. Claims 1, 2, 5-10, 12-15, 18-23, 25-29, 31-34, 36, 37, 87-90 and 161-171 are not obvious over Breen, Woodruff, Koch, Shaklai, Verbruggen or any combination thereof. Therefore, claims 1-37, 87-90 and 161-171 should be in a condition for allowance.

VII. Conclusion

The Applicants submit that the claims are in a condition for allowance and action toward that end is earnestly solicited. A check in the amount of \$130.00 is enclosed for the terminal disclaimer fee. It is believed that no additional fees are due; however, should any additional fees be required (except for payment of the issue fee), the Commissioner is authorized to deduct the fees from Jenkins & Gilchrist, P.C. Deposit Account No. 10-0447, Order No. 47097-01080USPT.

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Respectfully submitted,



John C. Gatz
Reg. No. 41,774
JENKENS & GILCHRIST, P.C.
225 West Washington Street
Suite 2600
Chicago, IL 60606-3418
(312) 425-3900 – telephone
(312) 425-3909 - facsimile

ATTORNEYS FOR APPLICANTS